

FCC MAIL SECTION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FCC 93M-241

31475

DISPATCHED BY
In re Applications of

ELDON F. HESTAND, JOHN C. McVEY, and
MICHAEL S. MORRIS d/b/a LAND
RUSH COMMUNICATIONS

ROBERT V. CLARK

For Construction Permit for a
New FM Station on Channel 273A
in Arkansas City, Kansas

MM DOCKET NO. 93-125

File No. BPH-910705MK

File No. BPH-910708MD

PREHEARING ORDER

Issued: May 6, 1993 ; Released: May 10, 1993

1. We will hold the Prehearing Conference on September 2, 1993, and the hearing will begin on September 20, 1993. Both will start at 8:30 a.m. and will be held in the Commission's offices in Washington, D.C. The applicants will exchange their direct case exhibits at the September 2, 1993 prehearing.

2. Appearances and Publication. On or before May 25, 1993, each applicant must show that they have complied with 47 CFR 1.221(c). See DA 93-466 released May 5, 1993 at para.8. On or before June 7, 1993, each must demonstrate that they have complied with 47 CFR 73.3594(g)'s publication requirements. See DA 93-466 supra. at para.9.

3. Clarification of Issues. The Chief, Audio Services has set down a standard comparative issue for hearing. See DA 93-466 supra., Issue 2. So, on June 1, 1993, each applicant will serve a standardized integration/diversification statement on their opponents, on Mass Media Bureau counsel, and on the Trial Judge.

4. The Chief has also called for comparative coverage. See DA 93-466 supra. at para.3. The parties should consider a joint areas and populations showing if only for reasons of economy. For if you can't agree on a joint coverage exhibit, each applicant must not only portray their own areas and population, but their opponents as well. But you are alerted now. If you take the joint exhibit route you will be bound by the agreed-upon showing. In any event get your approach to comparative coverage ironed out early on.

¹ The Trial Judge has blocked off three days for hearing: September 20-22, 1993. A courtroom has been reserved for those days.

5. All preliminary engineering will be exchanged on or before July 14, 1993. The final engineering will be exchanged at the prehearing conference.

6. Finally, the Chief has designated a contingent environmental impact issue against Land Rush. See DA 93-466 supra. at para.2, Issue 1. So they must file their Environmental Assessment Amendment on or before June 7, 1993.² And if they haven't satisfied the Mass Media Bureau by the time of the September 2nd prehearing conference, they must exchange their Issue 1 direct case evidence on that day.

7. All counsel should be prepared to discuss any questions about clarification of existing issues.

8. Discovery. Automatic Document Production will take place on June 1, 1993. Any In Camera inspection request must also be filed on that day. Any additional discovery must be initiated on or before June 7, 1993.

9. No 47 CFR 1.315 or 1.323 written interrogatories will be employed, and any depositions of opposing principals will be taken in Arkansas City, Kansas (unless otherwise agreed upon). Please don't notice a witness for any other place unless your opponent agrees to the location change.

10. All discovery will be completed by August 3, 1993. Discovery isn't to be used as a vehicle for obtaining data on which to base a motion to enlarge issues. If the issues are enlarged later on, any needed discovery on the enlarged issues will be provided for in the enlargement order.

11. Settlement. This case could prove to be long, and costly. Because of lawyer and engineering fees, both applicants will lose. At best one of you will have squandered substantial amounts of time and money prosecuting this case. Moreover, there is a direct relationship between the length of the trial and the costs involved. The general rule is the longer the trial, the greater the cost. So from your clients' viewpoint this prospective litigation is a mistake. Being merely another form of warfare it should be avoided. So engage in settlement dialogue now. The meter is running. Don't wait to argue before the Commission three and one-half years from today. Keep your settlement channels open and use them.

12. To this end, a negotiating principal from each applicant along with their attorney (if they're not pro se) are directed to attend a

That amendment must be served pursuant to para.7 of the HDO and accompanied by an appropriate Petition for Leave to Amend. See The New Continental Broadcasting Company, FCC 80M-102 released January 3, 1980 at Footnote 1.

deposition conference on August 12, 1993, at 2:00 p.m.³ This face-to-face conference will be held at a prearranged agreed-upon location. There the applicants should determine whether this case can be settled.

13. On or before August 19, 1993, the settlement conferees should submit a Joint Memorandum to the Trial Judge. There they should outline the results of the August 12th conference. The Memorandum should contain, but not necessarily be limited to, answers to the following questions:

- (a) Has this case been settled? If so, do the settlement's terms pose any public interest questions?
- (b) If the case hasn't been settled, were any offers made at the conference? If so, are they still open? For how long?
- (c) If the case has been settled, how soon can the Settlement package; i.e., the joint request for approval and accompanying papers, be submitted for approval?

14. Marshalling and Exchanging Exhibits. It will contribute significantly to the disposition of this proceeding for the parties to submit and exchange their direct affirmative cases in writing. This will include the sworn written testimony and the exhibits to be offered in support of their direct cases. Such an exhibit exchange will take place at the September 2nd Prehearing Conference.⁴

15. If a party intends to request that official notice be taken of any materials in the Commission's files, that material should be assembled in written form, properly identified by source, given a tentative exhibit number and exchanged on the date set.

16. Each party will assemble its exhibits in a binder. Each exhibit will bear a number, preferably by means of a tab on each document. Please number the exhibits serially starting with the number 1. Each exhibit will also contain the sponsoring witnesses' affidavit - if such an affidavit is required (See e.g. para. 15 supra.). Use a prefix to indicate who is sponsoring the exhibits; e.g. Land Rush Ex.1, Clark Ex.1.

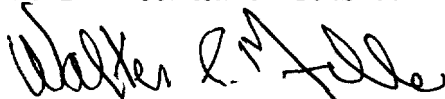
³ The parties needn't wait until August 12, 1993 to talk settlement. Nor should the mandatory face-to-face conference be the only effort at settlement. The mandatory August 12, 1993 date has been set because of its proximity to the September 2, 1993 Prehearing Conference.

⁴ Before he or she exchanges his written exhibits, counsel would be wise to review them - especially the comparative exhibits - and delete all unnecessary adjectives and comparative puffing. Let's save everybody time and money.

17. Evidentiary Admission Session. An Evidentiary Admission Session will be held on September 13, 1993, at 8:30 a.m. There each applicant (in Docket Order) will formally identify and offer the direct case exhibits he exchanged on September 2, 1993. The Trial Judge will rule on any objections to those exhibits. Immediately after the conclusion of the Evidentiary Admission Session, each party will notify his opponents of those witnesses they need to cross-examine and the exhibits or areas to be covered by that cross-examination.

18. The September 20-22, 1993 hearing dates are firm dates. A thorough but speedy trial is contemplated. The hearing dates will not be extended merely because counsel have agreed to a settlement.⁵

FEDERAL COMMUNICATIONS COMMISSION



Walter C. Miller
Administrative Law Judge

⁵ Daily hearing sessions will begin at 8:30 a.m. and end at 5:30 p.m. with an hour for lunch.